Filed 3/7/19 P. v. McClellan CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAWON VAN MCCLELLAN, Defendant and Appellant.	F076975 (Super. Ct. No. F17901151) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Michael G. Idiart, Judge.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Peña, J. and DeSantos, J.

Dawon Van McClellan (appellant) pleaded guilty to robbery, admitted he personally used a firearm, and admitted he suffered a prior strike and served a prior prison term. On appeal, he contends the trial court was unaware it had the discretion to dismiss the use of a firearm enhancement and, therefore, committed an abuse of a discretion at sentencing. We conclude appellant forfeited the abuse of discretion claim by failing to request the court dismiss the use of a firearm clause at sentencing, and that the record does not demonstrate the court was unaware of its discretion. Appellant also claims his defense counsel was ineffective for failing to request the trial court dismiss the use of a firearm enhancement. We find defense counsel's representation was adequate, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Fresno County District Attorney's Office filed an information charging appellant with second degree robbery (Pen. Code,[1] § 211), and alleged he personally used a firearm (§ 12022.53, subd. (b)), suffered a prior strike conviction (§§ 667, subds. (c)-(j), 1170.2, subds. (a)-(e)) and served a prior prison term (§ 667.5, subd. (b)). Appellant pleaded no contest as charged with an indicated 16-year sentence "lid" from the court.

Prior to sentencing, the probation department submitted a report recommending the court impose a 21-year sentence, the maximum possible term. The probation report incorrectly stated appellant's admission to the use of a firearm enhancement "mandates" he serve an additional ten years in prison.

Appellant was sentenced on January 10, 2018. At sentencing, defense counsel requested the court strike appellant's prior strike, strike the prior prison term enhancement, and impose a sentence lower than 16 years. However, defense counsel did not request the court strike the use of a firearm enhancement pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620).

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1 All further statutory references are to the Penal Code.

After stating it believed the probation department's recommendation of the maximum sentence was too high, the court sentenced appellant as follows: the mitigated term of two years for robbery, doubled to four years based on the prior strike allegation, plus ten years for the use of a firearm enhancement, for a total of 14 years. The court did not impose any additional time for the prior prison term allegation. Additionally, it made no reference to its discretion to strike the use of a firearm enhancement pursuant to Senate Bill No. 620.

DISCUSSION

I. Abuse of Discretion

Appellant contends the trial court did not understand it had the discretion to strike the use of a firearm clause. A court's refusal or failure to dismiss an allegation pursuant to section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) An abuse of discretion will only be found in limited circumstances, such as where a trial court is unaware of its discretion, considers impermissible factors in the exercise of that discretion, or renders a decision "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 375-377.)

Senate Bill No. 620, signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the use of a firearm enhancement provisions in sections 12022.5 and 12022.53:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, §1, 2.)

The new legislation thus granted trial courts discretion to strike firearm enhancements they did not previously possess.

Appellant was sentenced after Senate Bill No. 620 became effective. Because appellant did not request the court strike the use of a firearm clause at sentencing,

appellant forfeited his claim on appeal that the trial court abused its discretion. (*People v. Scott* (1994) 9 Cal.4th 331, 356 ["In sum, we hold that complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal."].)

Even assuming appellant had not forfeited the claim, we still find the record does not establish the trial court was unaware of its discretion. "[I]n light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of that discretion." (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.) Remand for resentencing is only appropriate where the record affirmatively demonstrates the trial court misunderstood the scope of its discretion. (*People v. Sotomayor* (1996) 47 Cal.App.4th 382, 391; *People v. Furhman* (1997) 16 Cal.4th 930, 944.)

The trial court did not address whether it believed it had discretion to strike the use of a firearm enhancement. The only reference in the record to the scope of the court's discretion was the probation report's erroneous representation that appellant's admission to the enhancement mandated the court impose an additional 10-year term. However, there is no indication in the record the trial court relied on this representation in imposing sentence. Therefore, in the absence of any affirmative representation by the trial court it believed it could not dismiss the firearm enhancement, we presume the trial court understood the scope of its discretion and did not commit error.

II. Ineffective Assistance of Counsel

Appellant contends defense counsel was ineffective for failing to request the court dismiss the use of a firearm clause. To prevail on an ineffective assistance of counsel claim, the appellant must establish that counsel's performance fell below an objective standard of reasonableness, and prejudice occurred as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105*; People v.*

Bradley (2012) 208 Cal.App.4th 64, 86-87.) The defendant has the burden of showing both deficient performance and resulting prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

In assessing the reasonableness of counsel's conduct, the appellate court is to defer to counsel's tactical decisions, and there is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.) The appellate court will intervene "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) "Because it is inappropriate for a reviewing court to speculate about the tactical bases for counsel's conduct at trial [citation], when the reasons for counsel's actions are not readily apparent in the record, we will not assume constitutionally inadequate representation … unless the appellate record discloses ' "no conceivable tactical purpose" ' for counsel's act or omission." (*People v. Lewis* (2001) 25 Cal.4th 610, 674-675.)

We find no basis in the record to conclude defense counsel's performance was deficient. Appellant pleaded as charged with the only promise that the court would not impose a sentence higher than 16 years. Given the serious nature of the charges, appellant's significant prior criminal history, and the trial court's willingness to reduce appellant's exposure at sentencing to a 16-year lid, defense counsel may have reasoned it would have been disadvantageous to her client to ask for an unreasonably low sentence. Instead, she requested the court dismiss appellant's strike prior and prison prior, which would have resulted in a 12-year sentence. Effective representation at sentencing does not require counsel to request the lowest possible sentence, or to request the court dismiss a charge or allegation simply because the court has the discretion to so. (See *People v. Memro* (1995) 11 Cal.4th 786, 834 ["The Sixth Amendment does not require counsel ' "to waste the court's time with futile or frivolous motions." ' "].) The record

demonstrates defense counsel made efforts to advocate for her client, and there is nothing that leads us to believe her decision was based on ignorance of the law or incompetence.

DISPOSITION

The judgment is affirmed.